In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-400

SUMNER H. WOODROW,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner Sumner H. Woodrow, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on May 26, 1977.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, pp. A1-16, is not as yet reported.

Jurisdiction

The judgment of the court below was entered on May 26, 1977. It is set forth in Appendix A hereto, *infra*, p. A17. Petitioner's motion to extend time within which to petition for rehearing to June 30, 1977, was allowed by the court below; and a petition for rehearing was filed on June 29, 1977. Rehearing was denied on August 17, 1977. The denial is set forth in Appendix A hereto, *infra*, p. A18. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. May a defendant be convicted of aiding and abetting or causing the commission of a crime merely upon the basis of evidence that he verbally encouraged the perpetrator and without any evidence that he assisted the perpetrator in the commission of the crime?

2. May a defendant who is accused of causing the commission of a crime be convicted merely upon the basis of evidence that he verbally encouraged the perpetrator?

3. May a defendant be convicted of aiding and abetting or causing the commission of a crime in the absence of evidence that he specifically intended "in some sort (to) associate himself with the venture, (to) . . . participate in it as something that he wishes to bring about, (to) . . . seek by his action to make it succeed"?

4. Does the failure to instruct the jury that before one may be convicted of being an aider or abettor he must have specifically intended "in some sort (to) associate himself with the venture, (to) . . . participate in it as something that he wishes to bring about, (to) . . . seek by his action to make it succeed", constitute "plain error"?

5. Is a defendant, who is tried with co-defendants against whom there is a "disparate quantum of evidence", entitled to a severance under Fed. R. Crim. P., Rule 14?

6. In a complicated conspiracy case is the unintentional lulling of defense counsel into believing that the court's cautionary instructions on the use of hearsay evidence would correctly follow court-approved instructions when, in fact, the jury was erroneously instructed that they could consider hearsay evidence in determining whether the conspiracy existed, so unfair as to make the error rise to the level of "plain error"?

7. In a case involving evidence of multiple conspiracies, is the failure to instruct the jury, despite a request so to do, that hearsay declarations and other evidence relating to one conspiracy could not be considered as evidence in connection with any other conspiracy, so prejudicial that defendant is entitled to a reversal?

8. In a case in which, according to the trial judge, the evidence was "pretty thin," is a defendant who offers evidence of his good reputation, entitled to an instruction, which he requested, that "such testimony alone . . . may be enough to raise a reasonable doubt of guilt"?

9. May a defendant be convicted of willfully and knowingly making or causing to be made a statement which is false and misleading in a document filed with the Securities and Exchange Commission merely on the evidence that he verbally encouraged the perpetrator without any evidence that he assisted in the preparation, supplied the information or examined the document before it was filed?

Constitutional and Statutory Provisions Involved

15 U.S.C., § 78*o*. *Registration of Brokers*

* * *

(b) (1) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and

any persons associated with such broker or dealer as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

(2) An application for registration of a broker to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application shall contain such information in such detail as to the applicant and as to the successor and any person associated with the applicant or the successor, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine. Such registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt such application as its own.

• • •

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of

section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

18 U.S.C. § 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an

offense against the United States, is punishable as a principal.

Statement of the Case

Petitioner Woodrow, an attorney, was charged with defendants Howard Smolar and Edward Vanasco and two other individuals and two corporate entities, the Technical Fund (a mutual fund) and Security Planners Limited (a registered broker-dealer) under a twenty count indictment alleging conspiracy and substantive violations of the federal securities laws.[1] (Appendix A hereto, *infra*, p. A-1.)

Count 1 charged all of the defendants with having conspired, during a 19-month period commencing on September 1, 1970, and ending on April 1, 1972, to violate some seventeen sections of the federal securities laws and various rules and regulations issued thereunder, that is, to commit the substantive offenses described in the other nineteen counts.

Count 2 charged all of the individual defendants with having, on or about January 1, 1971, unlawfully, wilfully and knowingly caused to be filed with the SEC a false

[1] Petitioner Woodrow was charged in 6 counts, 1, 2, 3, 5, 6, and 11. Count 5 was dismissed as to him prior to trial and his motion for acquittal, filed at the conclusion of the government's case, was allowed as to counts 1, 3 and 6. The jury convicted him on counts 2 and 11. The court below affirmed the judgment under count 2 but vacated the judgment and sentence under count 11 and remanded the same for further proceedings on that count. (Dkt. 1/3/75, 4/15–16/75; 16 Tr. 120-121, 131; 17 Tr. 51; Appendix A hereto, *infra*, pp. A2, 12 fn. 10, 16.) Smolar's motion for acquittal, also filed at the conclusion of the government's case, was allowed as to counts 3, 7-10, and 13-19. The jury convicted him on the remaining 6 counts. Vanasco's motion for acquittal, similarly filed, was also allowed as to counts 3, 7-10, and 13-19. He was acquitted by the jury under count 11 and convicted under the remaining 5 counts. The government dismissed count 20. Vanasco's Petition for Writ of Certiorari is numbered 77-5113 on the dockets of this Court.

application for registration of Security Planners Limited as a broker-dealer, the application listing as major shareholders nominees of defendants Smolar and Vanasco and an individual not tried with defendants, in violation of 15 U.S.C. §§78*o*(b), 78ff; 17 C.R.F. 240.10b-5.

Count 3 charged the individual defendants with having, in or about September 1970, unlawfully, wilfully and knowingly caused Security Planners Limited to act as an investment advisor to the Technical Fund without a contract having been approved by a vote of a majority of the outstanding voting securities of the Technical Fund.

Count 4 charged Vanasco with having, from on or about September 1, 1970 to April 1, 1972, unlawfully, knowingly and wilfully been associated with and actively participated in the business of Security Planners Limited, notwithstanding the fact that he had been barred by an SEC order from being associated with any broker-dealer.

Count 5 charged all of the individual defendants, excepting defendant Vanasco, with having, during the same period, permitted defendant Vanasco to become associated with Security Planners Limited and to participate in its business with knowledge that defendant Vanasco had been barred by an SEC order from being associated with any broker-dealer.

Count 6 charged all of the individual defendants with having, on or about February 19, 1971, unlawfully, wilfully and knowingly caused to be filed with the SEC a false Form X-17A-5 for Security Planners Limited, listing certain securities, valued at approximately $107,334.50, as having been donated to the corporation by Edward J. Hogan, its president, when in fact they had not been so donated.

Counts 7-10 each charged all of the individual defendants, excepting petitioner Woodrow, with having, on or about April 14, 1971, converted a customer's securities.

Count 11 charged all the individual defendants with having, on or about February 18, 1971, "defrauded the shareholders of the Technical Fund by causing the Fund to purchase from one, John Milliken 7,500 shares of unregistered Logic Corporation warrants, having little, if any, value at a price of approximately $29,400. The aforesaid defendants further caused $29,000 from the proceeds of the sale to be diverted into the capital account of Limited and further caused $400.00 from the proceeds of the sale to be paid to John Milliken as his compensation in the transaction."

Count 12 accused defendants Smolar and Vanasco and an individual not tried with them, as affiliated persons of the Technical Fund, with having, on or about March 2, 1971, unlawfully, wilfully and knowingly sold and caused to be sold to that corporation 6,000 shares of Computerized Knitwear and 2,500 shares of Algonquin Corporation at highly inflated prices.

Counts 13-17 each charged defendant Smolar and two other individuals not tried with him with having, in or about April and May 1971, milked Security Planners Limited by causing it to pay consulting fees to nominees of, or to fictitious persons for, defendant Vanasco.

Counts 18 and 19 each charged defendants Smolar and Vanasco and an individual not tried with them with having, in December 1971, milked the Technical Fund by causing it to purchase shares of Philharmonic Standard Corporation at a time when that corporation was insolvent.

Count 20 charged defendant Smolar with having, on or about January 12, 1972, milked the Technical Fund by causing it to purchase shares of Associated Mobile Schools and Modern Training Center stock at a time when trading in that corporation's stock had been suspended by the SEC.

Each defendant pleaded not guilty.

Prior to trial petitioner Woodrow seasonably filed a variety of motions, among which was a motion for relief from prejudicial joinder. (Dkt. 5/28/74.)

After a hearing, the trial judge denied the motion, ruling that "(i)n the posture of the case, the possible prejudice to the defendant Woodrow arising from a joint trial does not . . . justify a severance and a consequent double trial of some of the same issues." (Dkt. 9/26/74; Memorandum and Order 9/26/74.)

At the 24-day trial, there was evidence of the following.

"Security Planners Associates was a registered broker-dealer. Among other activities, it acted under contract as investment advisor to a mutual fund known as the Technical Fund." By September, 1970, petitioner Woodrow, his co-defendants, and others not on trial with them, were "associated with Security Planners (Associates) in some capacity. Smolar was President of the firm and portfolio manager for the Technical Fund. (Petitioner) Woodrow was an attorney who acted as counsel to both the individuals and the firm.[2] Vanasco, who was under an SEC bar prohibiting him from being associated with any broker-dealer, did not hold an official position, but several witnesses testified that he was 'running the show.'

"In 1970 it was determined that Security Planners Associates was having difficulties with its liabilities and bookkeeping that might endanger its registered broker-dealer status, and that a separate entity, Security Planners

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[2] Contrary to the conclusions of the court below, petitioner Woodrow never was the attorney for Security Planners Associates until after September, 1970. He did become the attorney for Security Planners Limited in September 1970, when that company was spun-off from Security Planners Associates and he subsequently represented Smolar and other individuals, but only in connection with SEC and NASD administrative and civil investigations and complaints against them and Security Planners Limited and also against Security Planners Associates after its former attorney resigned. (1 Tr. 16-19; 21 Tr. 73-78.)

Limited (Limited) should be spun-off to assume Associates' business. It is not alleged that this transaction was illegal. The government's theory of this case is that, between April (actually September 1, 1970), and September, 1972, (petitioner Woodrow, his co-defendants) . . . and others associated with Security Planners Limited filed false forms with the SEC and engaged in various fraudulent schemes to pump working capital into Limited in a desperate effort to keep it, and its broker-dealer registration, alive.[3] The government claims that the primary object of this effort to sustain Limited was to milk the only valuable asset it had—the Technical Fund." (Appendix A hereto, *infra*, pp. A2-3.)

There was evidence under Count 2 in the form of testimony of the President of Security Planners Limited (an admitted thief, perjurer and habitual liar who was given immunity in return for his testimony; 1 Tr. 50; 3 Tr. 58; 3 Tr. 62-69, 109-111, 116; 4 Tr. 18, 28-30, 34, 44-45, 47-50, 53-55, 94-97, 111-112, 124-129, 134; 5 Tr. 6-10, 22-24, 40, 55, 70, 148; 6 Tr. 27, 43, 49-50) that in January, 1971, he prepared and filed with the SEC a BD form for amending the registration of Security Planners Limited as a broker-dealer to reflect the changes in its officers, directors and stockholders; that the BD form falsely listed as its major shareholders nominees of defendants Smolar and Vanasco and an individual not tried with them; that he

[3] As indicated, the trial judge allowed petitioner Woodrow's pretrial motion to dismiss Count 5 and allowed his trial motion for acquittal as to Counts 1 (the conspiracy count), 3 and 6. His conviction under Count 2 was affirmed but his conviction under Count 11 was vacated because the trial judge's instructions on Count 11 allowed the jury to convict for "a significantly different offense (assuming that it described an offense at all under the statute) from the one charged in the indictment" (Appendix A hereto, *infra*, p. A9). Petitioner Woodrow was not even accused of being involved in any of the offenses alleged in Counts 4, 7-10, inclusive, and 12-20, inclusive.

knew at the time that it was false and that he was committing a crime when he filed it; that in September 1970, some four months before the filing of that form was due, he told petitioner Woodrow that he was concerned about falsifying the BD form by using the names of nominees and Woodrow told him that Vanasco's reason for not having his name mentioned was of such a minute nature that he should not be concerned about it, that Vanasco had been barred by the SEC at a very early age for a very minute offense, that as soon as it was appropriate he felt the bar could be lifted, and that the reason for Rodman's using Meerman as a nominee was that Rodman was a registered representative with another broker-dealer and that there was nothing to worry about. (1 Tr. 47-49; 5 Tr. 134-136.)

That was all the evidence under Count 2 implicating petitioner Woodrow.[4]

Petitioner Woodrow, on several occasions during the trial, renewed his motion "for relief from prejudicial joinder under Fed. R. Crim. P. 14 on the grounds that his alleged involvement was far less than that of his co-defendants; (and) that he would be prejudiced by vast amounts of testimony pertinent to his co-defendants but not to him." (Appendix A hereto, *infra*, p. A14.) His motion was denied.

During the trial, the judge, after initially announcing (and thereby unfairly lulling defense counsel into believing) that his cautionary instructions on the use of hearsay testi-

[4] In his charge to the jury, the trial judge instructed them that "the only evidence that connects (Mr. Woodrow) . . . with this indictment is the statement of Mr. Hogan that he discussed the matter with Mr. Woodrow and Mr. Woodrow in effect encouraged him to file the form by telling him that everything was going to be all right. Now, if you believe that and believe it beyond a reasonable doubt, that would warrant a finding of guilty. If you don't believe that beyond a reasonable doubt, you must find Mr. Woodrow not guilty." (22 Tr. 47.)

mony would follow the court-approved instructions in *United States* v. *Vitello*, No. 74-1137 (1st Cir. 1974) (an unpublished opinion), and in *United States* v. *Honneus*, 508 F.2d 566, 576-577 (1st Cir. 1974), erroneously told the jury, almost every time that hearsay evidence was admitted, that *they could consider hearsay evidence in determining whether the conspiracy existed*, even though they could not consider such evidence against an absent defendant until his participation in the conspiracy was established by independent non-hearsay evidence. The same erroneous instruction was read to the jury in his final charge. (Appendix A hereto, *infra*, pp. A3-4.)[5]

Petitioner Woodrow also moved for a judgment of acquittal under Count 2 as well as under the other counts. (Dkt. 4/15-16/75); 21 Tr. 149, 175; Appendix A hereto, *infra*, pp. A1-2.) His motion as to Count 2 was also denied.

In addition, the trial judge failed to instruct the jury, although requested so to do and subject to petitioner's objection, (i) that "if you should find that there was more than one conspiracy, then the acts and declarations made during the course of one conspiracy may not be considered by you in connection with any other conspiracy or any substantive offense not the object of the one conspiracy" (22 Tr. 70-72)[6]; and (ii) that "evidence of defendant Woodrow's reputation for honesty and veracity in his community and among his business associates[7] may be considered by

[5] For a more detailed discussion of the setting in which the trial judge repeatedly gave his erroneous cautionary instructions as to the limited use of hearsay evidence and his instructions as to multiple conspiracies, see Vanasco's *Petition for Writ of Certiorari*, No. 77-5113, pp. 5-9.

[6] There was evidence of "a number of different conspiracies" including evidence which the trial judge said implicated petitioner Woodrow in a conspiracy with respect to Counts 2 and 11 (16 Tr. 134-135; 17 Tr. 51-52).

[7] Petitioner Woodrow introduced such evidence in his defense (21 Tr. 137-139).

you in determining his guilt or innocence and may be enough to create a reasonable doubt" (22 Tr. 35, 70); and he failed to instruct the jury, although not requested so to do, that before one may be convicted of being an aider and abettor of the commission of a crime, he must have specifically intended "in some sort (to) associate himself with the venture, (to) . . . participate in it as in something that he wishes to bring about, (to) . . . seek by his action to make it succeed."

Petitioner Woodrow was found guilty on Counts 2 and 11 and was sentenced to be imprisoned for a period of one year. Sentence was suspended and he was placed on probation for one year. Execution of sentence has been suspended pending appeal.

As indicated, the court below affirmed the judgment on Count 2 but vacated the judgment and sentence under Count 11 and remanded the same for further proceedings on that count because the trial judge's instructions on that count allowed the jury to convict "for 'a significantly different offense (assuming that it described an offense at all under the statute)' from the one charged in the indictment." (Appendix A hereto, *infra*, p. A9).

Reasons for Granting the Writ

I., II. & III.

It seems to petitioner Woodrow that the evidence was insufficient to warrant a finding of aiding and abetting. Aiding and abetting requires something more than mere words of encouragement. "There must exist some *affirmative* participation which at least encourages the perpetrator." *United States* v. *Thomas*, 469 F.2d 145, 147 (8th Cir. 1972). (Emphasis added.) "Aiding and abetting means to *assist* the perpetrator of the crime." *United States* v.

Williams, 341 U.S. 58, 64 (1950); *United States* v. *Lane,* 514 F.2d 22, 26 (9th Cir. 1975). (Emphasis added.) ". . . In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his *action* to make it succeed.' L. Hand, J., in *United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938)." *Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949). (Emphasis added.)

So far as Woodrow is able to determine, in no case have mere words of encouragement been held to be enough. It is "active participation," not words, which may serve to encourage the perpetrator. *United States* v. *Thomas, supra*; *United States* v. *Wiebold,* 507 F.2d 932, 934 (8th Cir. 1974); *United States* v. *Baumgarten,* 517 F.2d 1020, 1027 (8th Cir. 1975). Typical cases showing that action, not words, is a prerequisite, follow.

In *United States* v. *Baumgarten, supra,* at 1027, the court said that "Baumgarten's actions, such as driving Stead to Sears, accompanying him to the gun shop, and picking up the electric drill with him, constituted sufficient 'affirmative participation.' "

In *United States* v. *Lane, supra,* at 27, the court said that "Lane associated with and participated in the criminal venture by acting as a sentinel and by warning the peddlers of police activity."

In *United States* v. *Wiebold, supra,* at 934, the defendant delivered the LSD on consignment to the seller who paid the defendant out of the proceeds of his sales.

In *United States* v. *Atkins,* 473 F.2d 308, 310-311 (8th Cir. 1973), the defendant, when asked by the supplier of heroin whether she knew anyone who wanted to buy heroin, replied that she did not know anyone but that she would see; and a few days later, she introduced a prospective

purchaser to the supplier and was present when the prospective purchaser asked the supplier for a sample.

In *United States* v. *Thomas, supra,* at 148, defendants and a third person sought a ride from the victim; and, when the ride was refused, the third person pulled a gun on the victim and the defendants immediately jumped into the victim's vehicle which was then driven away by the third person.

In *United States* v. *Harris,* 435 F.2d 74, 89 (D.C. Cir. 1970), the evidence showed that appellant's gun and car were used in the robbery and that his apartment was used as a meeting place and to conceal the loot.

In *H. L. Federman & Co.* v. *Greenberg,* 405 F.Supp. 1332, 1336 (S.D.N.Y. 1975), the district judge relied on decisions of the district and appeal courts in the Second, Third and Fifth Circuits in concluding that to be held liable civilly as an aider and abettor under the federal securities laws, one must not only have known of the wrongful purpose and had the requisite scienter, but one also must have "given substantial assistance to the primary wrongdoer."

Certainly criminal responsibility can require no less. In summary, there was no evidence that petitioner Woodrow was an aider or abettor.

But even if such evidence could conceivably be held to have been sufficient to warrant a finding of aiding and abetting, Defendant Woodrow is not charged in Count 2 with aiding and abetting the fraud or prohibition proscribed by 15 U.S.C. § 78ff, *United States* v. *Blitz,* 533 F.2d 1329 (1976), but with causing the form to be filed: and the causing of the commission of a crime is something different from committing it or from aiding and abetting its commission. Cf. *Nicolopoulos* v. *United States,* 332 F.2d 247, 248 fn. 2 (1st Cir. 1964).

As the court pointed out in *United States* v. *Leggett*, 269 F.2d 35 (7th Cir. 1959), wherein the defendant was accused of causing a salesman to bring a stolen automobile from the state where it was garaged to the state where the prospective purchaser resided:

> "Cause means 'to bring about; to bring into existence;.' It 'is a word of very broad import' and is used in (18 U.S.C.A. § 2[b]) in its well-known sense of bringing about,'."
>
> • • •
>
> "Leggett clearly brought about the unlawful interstate transportation of that stolen automobile and as surely violated 18 U.S.C.A. § 2312, as if he himself had driven the car."

In *Pereira* v. *United States*, 202 F.2d 830 (5th Cir. 1953), *aff'd*, 347 U.S. 1 (1953), wherein the defendant was accused of delivering to a local bank a check drawn on an out-of-state bank, the court, after recognizing the distinctions between the commission of an offense, the aiding and abetting of its commission and the causing of its commission, said:

> ". . . § 2(b) of Title 18 removes all doubt that one who 'causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal.' "

In affirming, this Court said at 8-9:

> ". . . That question (whether Pereira "caused" the mailing) is easily answered. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such act

> can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *United States* v. *Kenofsky*, 243 U.S. 440, 443 (1917); *United States* v. *Giles*, 300 U.S. 41 (1937).

In *United States* v. *Levine*, 457 F.2d 1186, 1888 (10th Cir. 1972), wherein defendants were charged with causing interstate travel with intent to promote or carry on certain unlawful activities, the court, in upholding the convictions, said:

> "Appellants are not charged as aiders and abettors, see, e.g., *United States* v. *Rodgers*, 10 Cir., 419 F.2d 1315, 1317, but with 'causing the interstate travel.' Section 2(b), 18 U.S.C. provides that one who 'willfully caused an act to be done which is directly performed by him or another would be an offense aaginst the United States, is punishable as a principal.' In the context of this provision 'cause' means 'a principal acting through an agent or one who procures or brings about the commission of a crime.' *United States* v. *Incisco*, 7 Cir., 292 F.2d 374, 378, and cases there cited, *cert. denied* 368 U.S. 920, 82 S.Ct. 241, 7 L.Ed.2d 135. One so acting is chargeable as a principal and punishable accordingly. *Ibid.*"

There is no evidence that Hogan was Woodrow's agent or that Woodrow brought about the filing of that false form.

It seems to petitioner that the court below's decision not only was wrong in not allowing his motions for acquittal addressed to Count 2, but is also in direct conflict with the decisions of other courts of appeal and of this Court.

Moreover, the court below, in denying petitioner's petition for rehearing, misconceived the thrust of petitioner's argument, namely, that without evidence, as was the case,

that petitioner Woodrow specifically intended to associate himself with the future filing of the false BD form and that he sought by what he told the President of Security Planners Limited to make the filing of the false BD form succeed, the evidence was insufficient to sustain his conviction. *United States* v. *Peoni*, 100 F.2d 401, 402 (2nd Cir., 1938); *Nye & Nissen* v. *United States*, 336 U.S. 613, 619, 620 (1949); *Bailey* v. *United States*, 416 F.2d 1110, 1113 (D.C. Cir. 1969); *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d 139, 162-163 (3rd Cir. 1973). "An inference of criminal participation cannot be drawn merely from" petitioner's verbal encouragement four months before the commission of the false filing; "a culpable purpose is essential." Cf. *Bailey* v. *United States*, 416 F.2d at 1113, and cases cited in note 15. "Substantial assistance (must) be given in effecting (the) . . . wrong", even to hold one civilly liable for aiding and abetting. *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d at 162-163.

IV.

As indicated in note 4 hereof, in his charge to the jury, the trial judge instructed them that:

> The only evidence that connects (Mr. Woodrow) . . . with this indictment is the statement of Mr. Hogan that he discussed the matter with Mr. Woodrow and Mr. Woodrow, in effect, encouraged him to file the form by telling him that everything was going to be all right. Now, if you believe that and believe that beyond a reasonable doubt, that would warrant a finding of guilty. If you don't believe that beyond a reasonable doubt, you must find Mr. Woodrow not guilty. (22 Tr. 47.)

An essential element of the offense of aiding and abetting is the specific intent "in some sort (to) associate himself with the venture, (to) . . . participate in it as something he wishes to bring about, (to) . . . seek by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Without such an instruction, "the jury may well have thought that by simply" verbally encouraging the wrongdoer some four months before the false filing, petitioner would be aiding and abetting the commission of the crime. Cf. *Moore* v. *United States*, 356 F.2d 39, 43 (5th Cir. 1966). But the law requires more than mere encouragement—it requires that the encourager do so with the specific intent to join in the criminal venture to bring it about. *Landy* v. *Federal Deposit Insurance Corporation*, 486 F.2d 139, 162-163 (3rd Cir. 1973).

The failure of the trial judge to explain to the jury that specific intent was a prerequisite, was plain error within Fed. R. Crim. P. 52(b), cf. *Byrd* v. *United States*, 342 F.2d 939 (1965); *United States* v. *Thomas*, 459 F.2d 1172, 1176 (D.C. Cir. 1972); *United States* v. *Krosky*, 418 F.2d 65, 68 (6th Cir. 1969); and the denial of petitioner's petition for rehearing because he "cannot now attack the court's instructions under Count 2 since he failed to do so on initial hearing" (Appendix A hereto, *infra*, p. A18) is in error (see Brief of Appellant Sumner H. Woodrow, filed in the court below, pp. 107-109, in which *United States* v. *Thomas* and *United States* v. *Krosky* were not only cited but were summarized).

V.

Admittedly, because of Count 1 of the indictment, which charged all of the defendants with having conspired to violate various sections of the Securities and Exchange Act of 1934 and various rules and regulations issued thereunder, joinder was permissible under F.R.Cr.P., Rule 8(b).

United States v. *Martinez,* 479 F.2d 824, 827-828 (1st Cir. 1973). The principal reasons for the rule appear to be the economy and efficiency of a single trial. *Bruton* v. *United States,* 391 U.S. 123, 134 (1967).

However, F.R.Cr.P., Rule 14, provides for a severance "where these objectives can(not) be achieved without substantial prejudice to the right of a fair trial", *Daley* v. *United States,* 231 F.2d 123, 125 (1st Cir. 1956). "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton* v. *United States,* 391 U.S. at 131 (fn. 6). In considering a Rule 14 motion for relief from prejudicial joinder, the factors of economy and efficiency must be weighed against a potential prejudice which a defendant is likely to suffer in a joint trial; and if the risk is real, severance not only is warranted, it is required. After all, paramount is the necessity of providing a complaining defendant with a fair trial.

Petitioner Woodrow believes that he was undoubtedly prejudiced by a joint trial.

First of all, there was a "disparate quantum of evidence" against appellant Woodrow's co-defendants. Cf. *United States* v. *Gambrill,* 449 F.2d 1148, 1159 (D.C. Cir. 1971).

Not only did the evidence implicate his co-defendants in the crime described in Count 6, an offense of which he was acquitted, and in the crimes described in Counts 7-10, 12-20, crimes with which he had no connection, but there was also evidence that the accountant, who had prepared and filed the false Form X-17A-5, as alleged in Count 6, only did so when threatened with bodily harm to his family and himself by one of the defendants. In addition, there was evidence of many other crimes committed by one or more of the co-conspirators. Needless to argue, "the slow but inexorable accumulation of (such) evidence", even

though not admitted as against Woodrow, was bound to, and undoubtedly did, rub off on him.

In *United States* v. *Kelly,* 349 F.2d 720, 759 (2d Cir. 1965), *cert. den.* 384 U.S. 947 (1966), the Court of Appeals for the Second Circuit, in holding that the district court had abused its discretion in denying defendant Shuck's motion for severance, made during the trial, said:

> "The principal and inevitable prejudice, however, was caused by the slow but inexorable accumulation of evidence of fraud practices by Shuck's co-defendants Kelly and Hagen . . . . That some of this rubbed off on Shuck we cannot doubt."

That court, again recognizing that in a long trial the defendant most severely prejudiced is the one who is linked to a small proportion of the evidence, said:

> "The jury is subjected to weeks of trial dealing with dozens of incidents of misconduct which do not involve these defendants in any way. As the trial days go by, 'the mounting proof of guilt of one is likely to affect another.' " *United States* v. *Branker,* 395 F.2d 881, 888 (2d Cir. 1968), and cases cited.

Similarly, the Court of Appeals for the Ninth Circuit, in reversing for failure to sever despite the trial judge's sincere efforts to limit the admissibility of evidence, said:

> "We find it impossible to conclude on the facts here that appellant was not severely prejudiced by the evidence relevant only to the co-defendants." *United States* v. *Donoway,* 447 F.2d 940, 943 (9th Cir. 1971).

Because the "disparate quantum of evidence" offered only against Woodrow's co-defendants obviously prejudiced him, he believes that his motion for relief from prejudicial joinder should have been allowed.

In the second place, a mere analysis of the indictment should have forewarned the trial judge that "the burden of defense to a defendant, *connected with one or a few of so many distinct transactions,* is vastly different not only in preparing for trial, but also in looking out for and seeking safeguards against evidence affecting other defendants to prevent its transference as 'harmless error' or the psychological effect, in spite of instructions for keeping separate transactions separate." *Kotteakos* v. *United States,* 328 U.S. 750, 766-767 (1945) (Emphasis added.) Such an analysis would have indicated, as the evidence ultimately confirmed, that there was evidence of "a number of different conspiracies: even though only one was charged. (16 Tr. 134-135; 17 Tr. 51.) While Woodrow's motion for judgment of acquittal was allowed as to Count 1, the trial judge ruled that "there was still . . . evidence of a conspiracy with respect to . . . counts (2 and 11) so that all of the evidence that is now in on those counts will stay in with respect to Mr. Woodrow" (17 Tr. 52); and although requested so to do (Woodrow's Request for Instructions No. 28), he never instructed the jury that hearsay declarations and other evidence relevant to one conspiracy could not be considered as evidence in connection with any other conspiracy. The potential prejudice, Woodrow believes, entitled him to a severance. *United States* v. *Varelli,* 407 F.2d 735, 744-748 (7th Cir. 1969).

This Court said in *Kotteakos, supra,* at 774, "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can really say prejudice to substantial right has not taken place." Cf. *Shaeffer* v. *United*

States, 362 U.S. 511 (1960). See also *Gregory* v. *United States,* 369 F.2d 185 (D.C. Cir. 1966), *cert. den.* 396 U.S. 865 (1956).

In *Gregory* v. *United States, supra,* the court said:

> "Here there was not only the danger of the evidence with respect to the two robberies cumulating in the jurors' minds tending to prove the defendant guilty of each, but the evidence as to one of the robberies was so weak as to lead one to question its sufficiency to go to the jury. Thus its primary usefulness in this trial was to support the Government's case as to the robbery which resulted in the murder." 369 F.2d at 189.

Because there was a real danger that guilt was transferred across the line separating the various conspiracies, Woodrow believes that this is an additional reason why his motion for severance should have been granted.

In *Gorin* v. *United States,* 313 F.2d 641, 646 (1st Cir. 1963), the court, after stating that "its function as an appellate court (was) . . . to examine the record with care to make sure that the trial judge minimized possible prejudice," concluded from a reading of the record that the trial judge had given correct and "appropriate limiting instructions at the outset of the trial, throughout its course, and finally at length in his charge . . . ." An examination of the record in this case will readily disclose that the trial judge's preliminary and final limiting instructions were, as shown elsewhere, incorrect in an important aspect, *United States* v. *Honneus,* 508 F.2d 566, 576-578 (1st Cir. 1974), *cert. denied,* 421 U.S. 948; and deficient in another essential aspect, *Kotteakos* v. *United States,* 328 U.S. 750, 771 (1945).

It seems to Woodrow that the burden on the judicial machinery apt to result from separate trials should never

serve as a reason for refusing a severance where, as here, there was a danger that the jury might use (i) "evidence of one crime to find guilt in another," *Garris* v. *United States*, 418 F.2d 467, 469 (D.C. Cir. 1969); or (ii) the "disparate quantum of evidence" against co-defendants to find a defendant guilty, *United States* v. *Gambrill*, 449 F.2d 1148, 1159 (D.C. Cir. 1971); *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965); *United States* v. *Branker*, 395 F.2d 881, 888 (2d Cir. 1968); or (iii) evidence relevant to one conspiracy to convict for another, *Kotteakos* v. *United States*, 328 U.C. 750, 774 (1945). As a matter of fact, not infrequently a joint trial is productive of so many trial and appellate difficulties that separate trials would better serve judicial economy, *United States* v. *Gambrill*, 449 F.2d at 1163. This was such a case. See *United States* v. *Wolfson*, 437 F.2d 862, 872-874 (2d Cir. 1970).

Because petitioner Woodrow was acquitted under Count 1 (the conspiracy count), the prejudice was clear. *Schaffer* v. *United States*, 362 U.S. 511, 523 (1959) (Douglas, J., with whom Chief Justice Warren and Associate Justices Black and Brennan concurred, dissenting).

For the foregoing reasons petitioner Woodrow believes that the trial judge erred in denying his pre-trial and trial motions for prejudicial joinder. Here, too, the court below's decision on prejudicial joinder (Appendix A hereto, *infra*, pp. A14-15), seems to be in direct conflict with the decisions in *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965); *United States* v. *Branker*, 395 F.2d 881, 888 (2d Cir. 1968); *United States* v. *Verelli*, 407 F.2d 735, 744-748 (7th Cir. 1969); *United States* v. *Donoway*, 447 F.2d 940, 943 (9th Cir. 1969); *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1966), *cert. den.* 396 U.S. 865 (1956).

VI.

During the trial, after initially announcing that his cautionary instructions on the use of hearsay evidence would follow his own court-approved instructions in *United States* v. *Vitello*, No. 74-1137, an unpublished opinion of the court below, decided on December 26, 1974 (some four months before the trial of this case commenced), as well as the court-approved instructions in *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), the trial judge erroneously told the jury, almost every time that hearsay evidence was admitted and again in his final charge, that *they could consider hearsay evidence in determining whether the conspiracy existed* even though they could not consider such evidence against an absent defendant until his participation in the conspiracy was established by independent non-hearsay evidence, and told counsel that the Court of Appeals for the First Circuit had "said in (the *Vitello* case) that the charge . . . was the right charge and that's why I am reading (it)" (see, e.g., 6 Tr. 200).

While the instructions did follow his instructions in *United States* v. *Vitello*, which, on appeal, were erroneously held by the court below to have been "full and correct," they were in fact defective, contrary to the approved limiting instructions set forth not only in *United States* v. *Honneus*, 508 F.2d at 576-577; but also in *United States* v. *Apollo*, 476 F.2d 157, 163-164 (5th Cir. 1973); and violated the minimum obligation on the trial judge in a conspiracy case established in *Lutwak* v. *United States*, 344 U.S. 604 (1953).

In now determining that "justice (does not require) a finding of reversible error", the court below relies on counsel's acquiescence in the instruction. In *Wainwright* v. *Sykes*, ___ U.S. ___, 45 L.W. 4807, 4811 (1977), this Court concluded that the defendant's failure to object in his state trial court to the admission of his inculpatory statement,

"absent a showing of 'cause' (for the failure and some showing of actual) 'prejudice' ", bars federal *habeas corpus* review of his *Miranda* claim. Petitioner believes that where, as here, the trial court forestalled any objection by telling counsel that the instruction being read had been held to be correct by the court below, a similar rule should obtain as a matter of fairness to him and to other defendants in his position. Since there is cause for a lack of objection, relief should be granted upon a showing of prejudice. Petitioner submits that there was the requisite prejudice at his trial, as is indicated by the failure of the court below to hold the error harmless.

Moreover, also erroneous was the court below's conclusion that "the record indicates that the independent non-hearsay evidence that a conspiracy existed, consisting of each appellant's own actions and statements, and discussions at which all were present, was adequate by any standard" (Appendix A hereto, *infra*, p. A6). After all, Woodrow was acquitted under Count 1 (the conspiracy count).

VII.

The trial judge also erred in failing to instruct "that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy" and to keep "distinct conspiracies distinct." *Kotteakos* v. *United States*, 328 U.S. 750, 769-770 (1945).

Prior to the conclusion of the defendants' defense, Woodrow filed his request for instructions to the jury. Request No. 28 read:

> "If you should find that there was more than one conspiracy, then the acts and declarations made during the course of the one conspiracy and for the purpose of carrying out that particular conspiracy may not be considered by you in connection with any other conspiracy or in connection with any other substantive offense not the object of that conspiracy."[8]

The trial judge neglected to give that instruction and Woodrow objected (22 Tr. 70-72).

On the instructions which the trial judge did give with respect to hearsay conspiracy testimony, it was open to the jury "to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another". *Id.*, at 771. This, Woodrow believes, affected his substantial rights, which included "a right not to be tried *en masse* for the conglomerate of distinct and separate offenses committed by others as shown by this record." *Id.*, at 775.

Especially because petitioner was acquitted under Count 1 (the conspiracy count) and was denied a severance even though tried with co-defendants against whom there was a "disparate quantum of evidence," petitioner believes that the trial judge not only was wrong in failing to instruct "that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy" and to keep "distinct conspiracies distinct," but clearly disregarded the *Kotteakos* teaching in that respect. *Kotteakos* v. *United States, Id.*, at 769-770.

VIII.

In his defense Woodrow introduced evidence of his excellent reputation for truth and veracity not only in the community where he lived (21 Tr. 18-20), but also among

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[8] As already indicated, there was evidence of "a number of different conspiracies", including evidence which the trial judge said implicated appellant Woodrow in a conspiracy with respect to Counts 2 and 11 (16 Tr. 134-135; 17 Tr. 51-52).

the members of the legal profession with whom he had habitually been associated in his profession (21 Tr. 137-139). Cf. *United States* v. *Parker*, 447 F.2d 826, 830-831 (7th Cir. 1971).

At the conclusion of all the evidence, Woodrow filed the following request for instruction to the jury:

> "50. Evidence of defendant Woodrow's reputation for honesty and veracity in his community and among his business associates may be considered by you in determining his guilt or innocence and may be enough to create a reasonable doubt."

In his charge, the trial judge instructed the jury as follows:

> "A witness' reputation in his community, if there is reputation evidence offered, may be considered by you, and that goes, as well, with respect to a defendant in the case who has testified, reputation as to truth and veracity, and that reputation goes then to the point of whether you will believe him or not.
>
> "Bear in mind also, in connection with this, with reputation, that the defendants here are not charged with being such-and-such type of person, good people or bad people. That is not what is the subject of the judgment in this case. The subject of the judgment in this case is whether or not they committed the acts with which they are charged in this indictment." (2 Tr. 35.)

Immediately after the completion of the judge's charge, Woodrow objected to the court's refusal to give Request for Instruction numbered 50 (22 Tr. 70).

As this Court said in *Michelson* v. *United States*, 335 U.S. 469, 476 (1948):

> Evidence of a defendant's "character is relevant in resolving probabilities of guilt. He may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. *This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. Edgington* v. *United States*, 164 U.S. 361." (Emphasis added.)

If ever there was a proper case for the requested instruction, this was it.

Here, the only evidence which could arguably have implicated Woodrow in the offense charged in Count 2 (the filing of the false BD form) was, according to the trial judge, "pretty thin". (17 Tr. 51.) Such evidence came from the mouth of the witness Hogan, an admitted accomplice, thief, perjurer and habitual liar, who, as already indicated, obviously purchased him immunity by his testimony. Involving Woodrow in the crime described in Count 11 (the purchase of Logic warrants by the Technical Fund) was the testimony not only of the witness Hogan but also of the witness Gennera, an unindicted and unnamed co-conspirator who admitted committing perjury to protect her boyfriend, defendant Rodman (4 Tr. 150-151; 6 Tr. 102, 124, 126-127, 139-142, 153, 160, 166).

Apart from attempting to impeach the credibility of these witnesses and in denying under oath on the witness stand their testimony, as he did, proof of his good reputation was the only mode by which Woodrow was able to repel the evidence implicating him. Such evidence alone may have been sufficient to raise "a reasonable doubt as to guilt and the accused is entitled to have the jury so instructed."

United States v. *Lewis*, 482 F.2d 632, 637 (D.C. Cir. 1973), and cases cited in footnotes 18 and 19. Here the trial judge minimized the value of the evidence. If the court had correctly instructed the jury, as requested by Woodrow and as it should have, "a reasonable doubt of (his) . . . guilt might have been raised which would have resulted in his acquittal.' " *Edgington* v. *United States*, 164 U.S. 361, 367 (1896); cf. *United States* v. *Albert*, 504 F.2d 892, 894-895 (1st Cir. 1974).

IX.

An affirmative duty of disclosure has been imposed upon accountants, directors and lawyers who write opinion letters. *Securities and Exchange Commission* v. *Spectrum Ltd.*, 489 F.2d 535 (1973). An accountant has a duty to correct an earlier financial statement which he had audited himself and upon which he had issued his certificate. Even if he did not write the footnote, he supplied the misleading computations. *United States* v. *Natelli*, 527 F.2d 311 (1975). There was no evidence that Woodrow ever assisted Hogan in the preparation of the broker-dealer form or that he ever supplied the information for the form or ever examined it before it was filed. He was not the person responsible for the preparation of the form or a controlling person of Hogan. *Securities and Exchange Commission* v. *Coffey*, 493 F.2d 1304 (1974).

Where an attorney passes on an offering circular, *Heit* v. *Weitzen*, 402 F.2d 909 (1968), *Black & Co.* v. *Nova Tech Inc.*, 333 F. Supp. 468 (1970), or where an attorney had the principal legal responsibility for reviewing a document for its completeness and accuracy, he may be held liable, but it was held in *Lanza* v. *Drexel & Co.*, 479 F.2d 1277 that it was the intent of Congress to impose liability only on those directors who fall within its definition of control

and who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons.

The defendant in this case could not be said to be a person responsible for the preparation of the form which was filed. It held that aiding and abetting has four elements to it: (1) wrong committed; (2) actual knowledge of it; (3) scienter intent to further the scheme, and (4) substantial assistance to the primary wrongdoer.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 75-1214, 75-1215,
75-1216

UNITED STATES OF AMERICA,

APPELLEE,

v.

HOWARD SMOLAR, EDWARD VANASCO,
and SUMNER H. WOODROW,

DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and MCENTEE, *Circuit Judges*.

Thomas J. Freedman, by appointment of the Court, for Howard Smolar, appellant.

Alexander Whiteside, II, by appointment of the Court, for Edward Vanasco, appellant.

Manuel Katz for Sumner H. Woodrow, appellant.

Richard W. Beckler, Attorney, Criminal Division, Department of Justice, with whom ***James N. Gabriel***, United States Attorney, and ***Mark S. Davidson***, Attorney, Criminal Division, Department of Justice, were on brief, for appellee.

May 26, 1977

COFFIN, *Chief Judge*. Appellants were charged, with two other individuals and two corporate entities, under a twenty count indictment alleging conspiracy and substantive viola-

tions of the federal securities laws.[1] On motions at the close of the government's evidence and at the close of all the evidence, the court entered judgment of acquittal on many of the substantive counts. Of the counts that went to the jury, appellant Smolar was convicted on all six counts; appellant Vanasco was convicted on five counts and acquitted on one; and appellant Woodrow was convicted on two counts. Appellants raise numerous issues on appeal, not all of which merit discussion.

Background

Security Planners Associates was a registered broker-dealer. Among other activities, it acted under contract as investment advisor to a mutual fund known as the Technical Fund. By 1970 each of the appellants was associated with Security Planners in some capacity. Smolar was President of the firm and portfolio manager for the Technical Fund. Woodrow was an attorney who acted as counsel to both the individuals and the firm. Vanasco, who was under an SEC bar prohibiting him from being associated with any broker-dealer, did not hold an official position, but several witnesses testified that he was "running the show".

In 1970 it was determined that Security Planners Associates was having difficulties with its liabilities and bookkeeping that might endanger its registered broker-dealer status, and that a separate entity, Security Planners Limited, (Limited) should be spun-off to assume Associates' business. It is not alleged that this transaction was illegal. The government's theory of this case is that, between April, 1970, and September, 1972, appellants and others associated with Security Planners Limited filed false forms with the

[1] Smolar was charged in 19 counts, Vanasco in 13, and Woodrow in 6.

SEC and engaged in various fraudulent schemes to pump working capital into Limited in a desperate effort to keep it, and its broker-dealer registration, alive. The government claims that the primary object of this effort to sustain Limited was to milk the only valuable asset it had—the Technical Fund. We shall recite more specific facts as necessary in discussing the various issues on appeal.

Instructions on the Use of Co-conspirator Hearsay Testimony

On the first day of trial, as soon as it appeared that testimony as to the out-of-court declarations of alleged co-conspirators was about to be elicited, the court on its own motion gave the jury a cautionary instruction limiting the use of co-conspirator hearsay testimony. The court asked if counsel had any additions or corrections to suggest, and no one questioned the content of the instruction.[2] The identical instruction was read to the jury numerous times during the trial, and again in the final charge. At no time did any of the defense counsel suggest that the instruction was defective. Now, however, all three appellants join in the contention that the instruction did not meet the requirements set forth in *United States* v. *Honneus,* 508 F.2d 566, 576-77 (1st Cir. 1974), since it allowed the jury to consider "evidence as to the actions and declarations of all alleged participants" in determining whether the conspiracy existed.[3]

[2] In several instances counsel did question whether there was in fact sufficient proof aliunde of conspiracy to warrant admission of the testimony even subject to the limiting instruction, but there was never a challenge to the instruction itself.

[3] The court read virtually the same instruction on each occasion, which said, in full:

"In determining, ladies and gentlemen, whether any particular defendant is guilty of participating in a conspiracy, In making this determination, you should consider only

In *Honneus* we held that failure to give a proper cautionary instruction before the introduction of any hearsay testimony would thereafter be considered plain error, and "result in reversal in any case where we believe the omission to have affected substantial rights." 508 F.2d at 577.[4]

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the evidence of the defendants' [sic] acts and statements.

If and only when the existence of the conspiracy charged in the indictment has been found by you, as a preliminary matter, and the defendant has been found to be a member of the conspiracy, solely on the basis of testimony and evidence as to his own statements or declarations or acts or conduct, then the acts done and the statements or declarations made by any other person found by you to be a member of the conspiracy may be considered as evidence in the case against the defendant—that is, a particular defendant that you may be considering—even though such acts and declarations may have been made in the absence of and without the knowledge of that particular defendant, provided such acts were done and such statements or declarations were made during the continuance of the conspiracy and in furtherance of the objectives or purposes of the conspiracy."

In the third paragraph, the court reporter wrote "defendants' " but we think the reasonable intendment was defendant in the singlar. In any event, the final paragraph of the instruction makes clear that each defendant's participation is to be determined "solely on the basis of . . . his own statements or declarations or acts or conduct."

you must first determine whether or not a conspiracy existed as charged in the indictment.

In determining whether the conspiracy existed, you should consider the evidence as to the actions and declarations of all alleged participants.

If you conclude that such a conspiracy did exist, you must next determine whether or not each defendant was a party to or a member of that conspiracy with knowledge of its illegality and with the specific intention to assist the conspiracy to its illegal objects.

[4] Since this case was tried before the new Federal Rules of Evidence became effective, we review the district court's instruction under the rule then applicable, as set forth in *Honneus*. Cases tried under the new rules will be governed by this court's interpretation of Fed. R. Evid. 801(d)(2)(E) announced in *United States* v. *Petrozziello*, 584 F.2d 20, 22-23 (1st Cir. 1977).

We said that the court should instruct the jury that the existence of a conspiracy and the defendant's participation in it must be established by independent non-hearsay evidence before the extra judicial statement of an alleged co-conspirator could be used against the defendant. It may be conceded that the instruction in this case failed to make clear that hearsay evidence could not be used in determining whether a conspiracy existed, but it did clearly require that each defendant's participation must be established by non-hearsay evidence, which is perhaps the more important element. We do not believe that *Honneus* compels the conclusion that this instruction was so plainly prejudicial that reversal is required. The failure to alert the jury, as hearsay testimony comes in, that its use is conditioned upon certain findings which must be based on non-hearsay evidence, creates a substantial risk that jurors, unschooled in the intricacies of the hearsay rule, will absorb all of the evidence and be unable to sort it out in accordance with a proper instruction at the close of the case. *See United States* v. *Apollo*, 476 F.2d 157, 163-64 (5th Cir. 1973). In the present case, however, the trial court took pains to focus the jury's attention on the difficult distinctions it would be called upon to make in using the hearsay testimony. We do not believe that the timely instruction in this case, although defective in one particular, created the same potential for prejudice to substantial rights that was present in *Honneus* and *Apollo*.

Moreover, it seems to us that framing an instruction that communicates to the jurors what they are required to do, without burdening them with so many subleties that they cannot sensibly do it, is an extremely delicate task. The trial court solicited counsel's suggestions and, contrary to appellant's contention on appeal, there is no indication in the record that it would have been unrecep-

tive to the arguments they now make.[5] The error now assigned could have been cured easily. While, as we said in *Honneus,* a timely cautionary instruction is a "minimum obligation on the trial judge in a conspiracy case", 508 F.2d at 577, *quoting United States* v. *Apollo, supra,* 476 F.2d at 163, this was not an invitation to counsel to ignore the contents of the instruction until appeal. We think that there is an obligation on defense counsel to give the trial court the benefit of their views on the subject, particularly when it has been the focus of considerable attention at trial.[6] Here the record makes clear that all defense counsel thought that the charge was a proper "*Honneus* instruction", and at one point actually referred to it as such. Under these circumstances, where the asserted defect was not just overlooked but was actually acquiesced in by counsel, we do not think justice requires a finding of reversible error. *See United States* v. *DeJesus,* 520 F.2d 298, 301 (1st Cir. 1975) (ambiguous instruction acquiesced in by counsel held not reversible error in pre-*Honneus* trial).

Finally, our review of the record indicates that the independent non-hearsay evidence that a conspiracy existed, consisting of each appellant's own actions and statements,

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[5] On the seventh day of this 23-day trial, the court made the following statement:

> "I will say to counsel, if you wish to protect your rights with respect to the limiting instruction, you had better rise to call to my attention any errors or omissions in this instruction as I give it, because your failure to take an objection at this point I will construe as meaning that you have no objection and find no error or omission in the instruction as I have given it."

There was no response.

[6] Without implying any impropriety in the present case, we would encourage dilatory tactics, and be "unfair to the court and the public generally if a defendant can have two bites at the cherry by saying nothing and then coming back and asking for a second chance." *Dichner* v. *United States,* 348 F.2d 167, 168 (1st Cir. 1965).

and discussions at which all were present, was adequate by any standard. *See United States* v. *Diaz,* 538 F.2d 461, 464-65 (1st Cir. 1976). Since the jury was clearly instructed that only a defendant's own statements and actions could be used in determining whether he participated in the conspiracy, we think it is clear that the asserted defect in the instructions did not affect substantial rights. *See id*; *United States* v. *Honneus, supra,* 508 F.2d at 577.

Instructions on Count 11 — Variance

Appellants Woodrow and Smolar challenge the court's instructions under count 11 of the indictment. The indictment charged that they, with others,[7] had defrauded the shareholders of the Technical Fund by causing

> "the Fund to purchase from one, John Milliken 7,500 shares of unregistered Logic Corporation warrants, having little, if any, value at a price of approximately $29,400. The aforesaid defendants further caused $29,000 from the proceeds of the sale to be diverted into the capital account of Limited and further caused $400.00 from the proceeds of the sale to be paid to John Milliken as his compensation in the transaction."

The government's main witness on this count was John Milliken. He testified that at the time of the sale registered Logic stock had a value of $8 per share, and that the warrants he sold the Fund were options to buy un-

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[7] William Rodman, who was not tried with the appellants, and appellant Vanasco were also charged in this count. As to Vanasco the jury was instructed, in accordance with *Pinkerton* v. *United States,* 328 U.S. 640 (1946), that he could be found guilty only if he was a member of a conspiracy and one of his co-conspirators had committed the offense in furtherance of the conspiracy. The jury acquitted Vanasco.

registered stock at 13 cents per share. The purchase price was $29,400, which Milliken received in the form of a $29,400 note from Security Planners Limited and a check for $400. On cross-examination, Milliken testified that this price was about "half the market", and that some months after this transaction registered Logic stock was selling at approximately $15 per share, and that it reached a high of $32.[8]

At the close of the government's case all defendants moved for judgment of acquittal on count 11 on the ground that the government had offered no evidence that the Logic warrants were "of little if any value" as charged in the indictment. The district court apparently agreed that there was no such evidence,[9] but denied the motions for acquittal: the court was of the opinion that, regardless of the actual value of the shares or ultimate harm to the Fund, the scheme was fraudulent and in violation of 15 U.S.C. § 78j and Rule 10b-5 if its purpose was to defraud the Fund. As the court put it in the course of argument on the motion, it believed that individuals who set out, with fraudulent intent, to divert cash from the Fund by causing it to buy this stock should not be relieved of criminal liability simply because the stock, through mere fortuity, later increased in value.

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[8] The court expressed concern that the price of registered shares did not reflect the value of unregistered shares, but the testimony was not excluded. Appellants said that a relationship in value could be demonstrated.

[9] The government argued that the cash payment of only $400 to Milliken was evidence that the stock was only worth that much, but the court did not seem to accept this. In light of the theory on which this count went to the jury, we expres no view on the sufficiency of the evidence in this record as to the value of the warrants.

The court's final charge to the jury briefly summarized Milliken's testimony as to value at the time of the sale, and continued:

> "The issue here that you must determine, and I am going to have to just leave it to you without being able to assist you very much, but it is for you to determine from all the circumstances whether this transaction was a genuine transaction on the part of Smolar in behalf of the fund, having the interests of the fund in mind, as was his duty, or whether it was primarily a scheme to divert cash from the treasury of the fund into the treasury of Security Planners Limited.
>
> If it was a scheme to get cash out of the fund, regardless, without any regard, any real regard being given to whether this was for the benefit of the fund or not, then it would be a fraudulent scheme within the meaning of 15 United States Code Section 78j.
>
> If you find that even though the original plan was to subordinate, make a subordinated loan to Security Planners Limited, Mr. Smolar, on behalf of the fund, as a legitimate transaction, elected to purchase these unregistered Logic Corporation warrants, then the offense has not been committed."

The effect of the court's instruction was to remove the allegation that the warrants were of "little if any value". The government argues that the indictment charges an offense even without this language, and that it was therefore "mere surplusage", which the district court was entitled to strike. Fed. R. Crim. P. 7(d). *See United States v. Cirami*, 510 F.2d 69, 72-73 (2d Cir. 1975). We cannot agree. Even assuming that the instruction does describe an offense under the statute, it is a significantly different

offense from the one charged in the indictment. Thus, we agree with appellant's contention that the instruction constituted a material and prejudicial variance from the charge in the indictment. *See Stirone* v. *United States*, 361 U.S. 212 (1960).

The government asserts that it need not prove actual loss to investors in prosecuting fraudulent practices under § 78j and Rule 10b-5, *see* 1 Bromberg, *Securities Law: Fraud* § 2.6(1) at n. 131; *Farrell* v. *United States*, 321 F.2d 409, 419 (9th Cir. 1963). But the court's instruction did not simply point out that a fraudulent scheme need not be a profitable one. Rather, by eliminating the issue of value, the court materially changed the theory on which the scheme was alleged to be fraudulent. The indictment charged a sale of worthless securities—as the government put it at times during the trial, the "milking" of the Fund. The instruction, however, focuses on appellant Smolar's duty to act in the interests of the Fund, and states that the determinative issue is whether this was a "genuine transaction . . . in behalf of the fund". The distinction between outright fraud as charged in the indictment and a breach of fiduciary duty cannot be dismissed as insignificant. *Cf. Santa Fe Industries, Inc.* v. *Green*, — U.S. —, 45 U.S.L.W. 4317 (March 23, 1977). In this context, the allegation that the Logic warrants were "of little if any value" was not merely a "useless averment", *see Ford* v. *United States*, 273 U.S. 593, 602 (1927); it was the critical averment that made the scheme, as alleged, fraudulent.

Since the court's instruction did not simply remove from the jury's consideration one of several theories of fraud alleged, *compare New England Enterprises, Inc.* v. *United States*, 400 F.2d 48, 65 (1st Cir. 1968), but instead materially altered the theory of criminal liability set forth in the indictment, it cannot be said that the indictment sufficiently apprised appellants of the nature of the charges

against them. *Compare United States* v. *West*, — F.2d — (8th Cir. 1977) (slip op. at 13-14). And apart from the prejudice appellants necessarily suffered in being forced to respond to a new theory of liability midway through trial, after the opportunity for cross-examination of the government's witness had passed, we think the variance in this case deprived appellants of the fundamental protection the grand jury is designed to provide: "to limit [a criminal defendant's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States, supra*, 361 U.S. at 218. The Court reiterated in that case what had been established long before: that this protection is lost if the court is free to change the charging part of an indictment "to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes . . . ." *Id.* at 216, *quoting Ex parte Bain*, 121 U.S. 1, 10 (1887). *Cf. Russell* v. *United States*, 369 U.S. 749, 770-71 (1962); *United States* v. *Cirami, supra*, 510 F.2d at 72.

The anti-fraud provisions of the federal securities laws are remedial in nature, and have been given a flexible construction in the courts. *See Santa Fe Industries, Inc.* v. *Green, supra*, 45 U.S.L.W. at 4320-21 & cases cited at n. 15. We think it is especially important when a charge is brought under generally-worded provisions like § 78j and Rule 10b-5, which prohibit a broad range of "ingenious devices", *see id.* at 4321, that the indictment state with particularity the theory on which it charges "acts, practices and courses of business which operated and would operate as a fraud and deceit." *See Russell* v. *United States, supra.* And we think it equally important in such cases that the government be required to prove the theory it has charged.

See Stirone v. *United States, supra.* Therefore, the convictions and sentences under count 11 are vacated, and the case will be remanded for further procedings.

Instructions on Count 1 — Variance

Count one of the indictment charged appellants and several others with conspiracy to violate a lengthy list of federal securities laws. Subsequent paragraphs of the indictment described as "parts" of the conspiracy the transactions involved in the substantive counts of the indictment, and the overt acts included activities in connection with the various transactions. In its instructions to the jury on this count, the court observed that, while the indictment charged a single conspiracy, the jury might find that the evidence established a series of conspiracies. The court then instructed that, despite this "variance", "you may find either one of the defendants guilty under this count if you are satisfied beyond a reasonable doubt that they entered into a conspiracy to accomplish any one of the acts charged in the other counts in this indictment." Appellants Vanasco and Smolar contend that this instruction was a fatal variance from the indictment.[10]

We do not agree. The instruction merely establishes that the jury could convict if it found proof beyond a reasonable doubt of any one of the alleged "parts" of the conspiracy. *Cf. New England Enterprises, Inc.* v. *United States, supra,* 400 F.2d at 65. It, unlike the instruction under count 11, did not materially alter the theory of criminal liability on which the grand jury acted. It is well established that such a "variance" in a conspiracy case is not fatal if it does not result in actual prejudice to

[10] All three appellants were charged under this count, but the court entered a judgment of acquittal at the close of all the evidence as to Woodrow.

the defendant at trial. *See Berger* v. *United States,* 295 U.S. 78, 82 (1935); *Kotteakos* v. *United States,* 328 U.S. 750, 767-68, 773 n. 29 (1946). Appellants argue that they were prejudiced by the possibility that if the jury did find separate conspiracies, hearsay testimony may have "spilled over" from one conspiracy to another. However, at least as it ultimately went to the jury, this was not a particularly complicated conspiracy charge, and we think appellants' interest in keeping "separate conspiracies separate", *Kotteakos, supra,* 328 U.S. at 772, was adequately protected by the court's instructions.

Instructions on Count 12

Count 12 charges that appellants Vanasco and Smolar did "sell and cause to be sold" to the Technical Fund certain stocks, in violation of the Investment Companies Act, 15 U.S.C. §80a—17(a), which prohibits an affiliated person selling for his own account to a registered fund. The government's main witness on this count was Akiyoshi Yamada, who testified that he controlled another mutual fund, and that he and Vanasco had agreed to "warehouse" stocks for one another: that is, that each would sell stocks for his own account in equal amounts to the mutual fund controlled by the others. Thus, warehousing is essentially a manipulative device whereby a person controlling a mutual fund buys stocks for its portfolio without regard to investment merit, but solely as a favor to the seller, who may be in a position to reciprocate. The practice may have other uses, but in this case it operated to allow an affiliated person, prohibited by law from trading with his own mutual fund, to deal instead through another, nominally independent, fund.

Appellants argue that this transaction does not fall within the prohibitions of the Act, since it is clear that Vanasco

did not himself trade with the Technical Fund. We agree, however, with the district court's analysis of the situation in his instruction to the jury on this count:

> "This does not fit precisely within this section because the security which The Technical Fund bought was not the security which Vanasco is alleged to have sold, but if the intention was to sell a stock and get the money out of The Technical Fund, that intention was carried out by this reciprocal arrangement and it is not open to a person to avoid the strictures of this section by a device of this kind, 'You scratch my back and I scratch yours . . . .' "

The Second Circuit undertook a thorough analysis of the purposes and scope of the Investment Companies Act in *United States* v. *Deutsch*, 451 F.2d 98 (2d Cir. 1971). The statute was enacted in response to reports of "fantastic abuse of trust by investment company management and wholesale victimizing of security holders", 451 F.2d at 108, and was "designed primarily to correct the abuses of self-dealing which had produced injury to stockholders of investment companies." *Id.* We therefore hold that the scheme Vanasco and Yamada devised falls well within the intended prohibitions of the Act, which cannot be so cavalierly avoided by the use of artful devices and friendly combinations. An unduly restrictive interpretation of this statute would make the task of regulation impossible. Particularly in the securities area, it seems that those bent on fraud can always think of new devices when an old one is outlawed. A more flexible reading, in light of the purposes of the Act, is both sensible and fair: the language of the statute conveys a "sufficiently definite warning . . . when measured by common understanding and practices", *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947), that the conduct

charged in the indictment is proscribed. *See also United States* v. *Deutsch, supra*, 451 F.2d at 113-14. Therefore, we find no defect in the indictment under count 12 or in the instructions on this point.

Prejudicial Joinder

Appellant Woodrow moved both before trial and at several points during trial for relief from prejudicial joinder under Fed. R. Crim. P. 14 on the grounds that his alleged involvement in the scheme was far less than that of his co-defendants; that he would be prejudiced by vast amounts of testimony pertinent to his co-defendants but not to him; and that exculpatory testimony from his co-defendants would not be available to him.

Where, as here, joinder of defendants is proper under Fed. R. Crim. P. 8(b), a motion for severance under Rule 14 is addressed to the discretion of the trial court, and "defendants must make a strong showing of prejudice in order to invoke the discretionary remedies of this rule." *Sagansky* v. *United States*, 358 F.2d 195 (1st Cir. 1966). *See also Gorin* v. *United States*, 313 F.2d 641 (1st Cir. 1963). The first two grounds that Woodrow asserts are insufficient, either separately or in combination, to render denial of severance an abuse of discretion. *See United States* v. *Mardian*, 546 F.2d 973, 979 (D.C. Cir. 1976). *See generally* 1 Wright & Miller, *Federal Practice and Procedure* § 223. And, while the availability of exculpatory testimony is an important consideration, severance is not required particularly where there has been no showing that the testimony would in fact be available upon severance, or that it would in fact be exculpatory. *See United States* v. *Henderson*, 471 F.2d 204, 206 (7th Cir. 1972); 1 Wright & Miller, *Federal Practice and Procedure* § 225.

As we have indicated in *Gorin, supra,* we are aware of the potential for prejudice in a complicated conspiracy trial involving several defendants. But that potential is minimized where, as here, the trial court takes great pains to give appropriate limiting instructions and to impress upon the jury its duty to determine the guilt of each defendant individually.[11]

Cross-Examination of Witness Peters

Appellants contend that their cross-examination of the government's witness Charles Peters was improperly limited when the trial court excluded inquiry into the terms of a grant of immunity to Peters in connection with a securities fraud prosecution in the Southern District of New York. They argue that, while the immunity did not extend to the acts charged in the Massachusetts indictment, that does not exclude the possibility that Peters' New York deal included cooperation in other federal prosecutions, including appellants'. We agree that a criminal defendant must be given wide leeway in his effort to impeach a government witness for bias, and we think that the line of inquiry appellants suggest would have been proper. However, if it was a proper subject of cross-examination, it was also a proper subject on direct—yet appellants succeeded in preventing the prosecuting attorney from introducing it. The district court sustained appellants' objections on the theory that the evidence of Peters' involvement in other securities frauds would be prejudicial to the appellants, since Peters was associated with them

[11] In instructing the jury on the two counts involving Woodrow the court made very clear what the particular evidence of his involvement was. For this reason, and because the court instructed the jury that Woodrow was not to be considered as a co-conspirator, we do not think any error in the instruction on co-conspirator hearsay testimony enhanced the risk of prejudice to Woodrow.

in the Security Planners firm. Having succeeded at this point, thereby preventing the prosecution from taking the sting out of cross-examination for bias, we think appellants were foreclosed from pursuing the matter. We find no error in the district court's ruling.

We have considered each of appellants' remaining contentions as to the sufficiency of the evidence, evidentiary rulings, and instructions to the jury, and find no reversible error.

The judgments of conviction and sentences under count 11 are vacated and the case is remanded for further proceedings on this count and such resentencing as may be appropriate. In all other respects, the judgment of the district court is affirmed.

United States Court of Appeals
For the First Circuit

No. 75-1216.

UNITED STATES OF AMERICA,
APPELLEE,

v.

SUMNER H. WOODROW,
DEFENDANT, APPELLANT.

JUDGMENT
Entered May 26, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of conviction and the sentence under Count 11 are vacated and the cause is remanded for further proceedings on this Count and such resentencing as may be appropriate. In all other respects, the judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP, *Clerk.*

[cc: Messrs. Katz and Beckler.]

United States Court of Appeals
For the First Circuit

No. 75-1216.

UNITED STATES OF AMERICA,
APPELLEE,

v.

SUMNER H. WOODROW,
DEFENDANT, APPELLANT.

ORDER OF COURT
Entered August 17, 1977

The petition for rehearing is denied. The arguments petitioner now makes as to the prejudicial effect of the *Honneus* instruction were considered by the court on initial hearing. Petitioner cannot now attack the court's instructions under Count 2 since he failed to do so on initial hearing, and has not offered any justification for the omission.

By the Court:
(s) DANA H. GALLUP, *Clerk.*

[cc: Messrs. Katz and Beckler.]